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90-662

Supreme Court, U.S.
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NO. _____

IN THE
SUPREME COURT
OF THE UNITED STATES

October Term, 1990

INSURANCE COMPANY OF NORTH AMERICA

Petitioner

vs.

M/V OCEAN LYNX, a/k/a M/V OCEAN LINK, her engines, tackle, furnishings, etc., in rem, MAR SHIPPING, INC., a foreign corporation, A. BOTTACCHI S.A. DE NAVEGACION,a foreign corporation,

Respondents.

PETITION FOR WRIT OF CERTIORI
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether it is necessary for a carrier to provide a shipper of goods with a choice of freight rates and for the shipper of goods to voluntarily elect to ship at a lower rate in order for a carrier to enforce a provision in a bill of lading limiting its liability for damage to cargo.

2. Whether a shipper and consignee of cargo can be bound to terms and conditions contained in an illegible bill of lading.

PARTIES TO PROCEEDING BELOW

INSURANCE COMPANY OF NORTH AMERICA

EDUCATIONAL INNOVATIVE SYSTEMS, INC., (EDUSYSTEMS)

A. BOTTACCHI S.A. DE NAVEGACION

MAR SHIPPING LINE, INC.

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OFFICIAL REPORT CITATION

INSURANCE COMPANY OF NORTH AMERICA vs. M/V OCEAN LYNX, 901 F.2d. 934 (11th Cir. 1990)

JURISDICTION

(i.) The Judgment of the Eleventh Circuit was entered August 14, 1990.

(ii.) The Eleventh Circuit's Order Denying the Petition for Rehearing of the Defendant A. BOTTACCHI S.A. DE NAVEGACION was entered on June 20, 1990.

(iii.) The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254, and Rule 12 of the Rules of the United States Supreme Court.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED

Carriage of Goods by Sea Act, 46 U.S.C. Section 1301 et seq. In particular, the petition concerns 1304(5) which states:

> **Amount of liability; valuation of cargo**
>
> Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in

case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. This declaration, if embodied in the bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier.

JURISDICTION OF DISTRICT COURT

The United States District Court, Southern District of Florida had original jurisdiction pursuant to 28 U.S.C. Section 1333. This is an admiralty and maritime claim brought pursuant to Rule 9(h), Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

The Plaintiff's assured shipped a cargo of educational equipment in international trade. This shipment was carried on the deck of the M/V OCEAN LYNX and was lost at sea. Suit was filed against the charterer and operator of the vessel, A. BOTTACCHI S.A. DE NAVEGACION and the non-vessel operating common carrier (NVOCC) MAR SHIPPING LINE, each of whom issued bills of lading to the shipper covering the shipment and who asserted a right to limit their liability to $500.00 per package pursuant to the terms of the bills of

lading. The Eleventh Circuit found that the tariff of the ocean carrier who lost the shipment did not contain a choice of freight rates but the Court permitted the carrier to limit its liability on the basis that the Carriage of Goods by Sea Act provides for a limitation.

In addition, the Eleventh Circuit found that the NVOCC's bill of lading was illegible but permitted a limitation or liability on the basis that a freight forwarder employed by the shipper in Miami had prepared numerous bills of lading but was not in the habit of reading them.

ARGUMENT ON WRIT OF CERTIORI

I. THE ELEVENTH CIRCUIT HAS RULED THAT AN OCEAN CARRIER'S LIABILITY FOR CARGO DAMAGE MAY BE LIMITED UNDER THE CARRIAGE OF GOODS BY SEA ACT EVEN IF THE SHIPPER HAS NOT BEEN OFFERED A CHOICE OF FREIGHT RATES AND ELECTED TO SHIP AT A LOWER RATE IN EXCHANGE FOR LIMITED CARRIER LIABILITY. THE ELEVENTH CIRCUIT DECISION IS IN CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT.

Under Federal law, a carrier may limit its liability for damage to cargo only if the carrier offers a shipper a choice of freight rates and the shipper voluntarily elects to the ship its good at the lower rate in exchange for limited carrier liability. The two rates, which are common to rail, truck, air, and ocean shipments are known as the released rate (the lower rate) and the ad valorem rate (the higher rate). The leading case on limitations of carrier's liability is New York, New Haven & Hartford R.R. Company vs. Nothnagle, 347 U.S. 128, 73 S.Ct. 986, 97

L.Ed. 1500 (1953). In Nothnagle, this Court summarized this rule stating that "only by granting its customers a fair opportunity to choose between higher or lower liability by paying a correspondingly greater or lesser charge can a carrier lawfully limit recovery to an amount less than the actual loss sustained. Boston & Maine Railroad Company vs. Piper, 247 U.S. 438, 444, 445, 62 L.Ed. 820, 822, 823, 38 S.Ct. 354 (1918); Union Pacific Railroad Company vs. Burke, 255 U.S. 321-323, 65 L.Ed. 656, 659, 660, 41 S.Ct. 283 (1921)."

The Eleventh Circuit noted in its opinion that the carrier's tariff "does not provide a method through which a shipper of goods...can avoid COGSA's Section 4(5)'s limitation on liability."[1] Nevertheless, it permitted the

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[1] The ocean carrier's tariff did provide an ad valorem freight rate for "Currency, Specie, Gold or Silver Bullion, Precious

carrier to limit its liability.

The basic reason for the Federal common law rule that a limitation of liability cannot be imposed by the carrier absent a choice of freight rates is that a shipper should not be required to forego its right to recovery without compensation. A shipper which knowingly elects to ship its cargo at a lower freight rate in exchange for limited carrier liability cannot complain if its cargo is lost and its gets only a limited recovery for it. In this case, the shipper made no such election. It paid the highest freight rate chargeable by law.

The Eleventh Circuit's rational for permitting the carrier to limit its liability

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Metals N.O.S., and Negotiable Securities" but did not provide an ad valorem freight rate for general cargo such as shipped by the shipper in this case.

in the absence of the shipper's election to ship its cargo at a lower rate is the Court's assertion that once a bill of lading recites that the Carriage of Goods by Sea Act will be applicable to the shipment, the limitation of liability automatically applies because the Act itself provides for limited liability, thereby preempting, rather than supplementing the Federal common law on the subject of limitations of carrier's liability. No other Court has so found that the Act preempts the common law rule. The common law rules is that the shipper and carrier bargain for limited liability. Here, the shipper did not get the benefit of the bargain since it paid the highest freight rate and incurred the adverse effects of limited liability.

The practical effect is to emasculate the uniformity of maritime law. Under the Eleventh Circuit's decision, carriers would be

required to offer a choice of freight rates to limit their liability for the 75% of cargo shipments which are exempt from COGSA and would not be required to do so for the 25% to which COGSA applies.

The uniform approach to transportation of goods by common carrier is to apply the Federal common law doctrine of limitation of liability by estoppel to all forms of shipment including ocean carriage of cargo where COGSA is applicable, to ocean carriage of cargo in a non-COGSA context, to overland carriage of freight pursuant to the Interstate Commerce Act, and the carriage of air freight pursuant to the Warsaw Convention. There is no basis for carving out an exception for ocean carriage subject to the Carriage of Goods by Sea Act which does away with the Federal common law principle.

II. THE ELEVENTH CIRCUIT HAS DECIDED THAT A SHIPPER CAN BE BOUND BY A LIMITATION OF LIABILITY CLAUSE ILLEGIBLY PRINTED IN THE FINE PRINT ON THE REVERSE SIDE OF A BILL OF LADING. ITS DECISION IS IN CONFLICT WITH THE DECISIONS OF THE FOURTH AND NINTH CIRCUITS THAT REQUIRE THAT CLAUSES LIMITING AN OCEAN CARRIER'S LIABILITY BE LEGIBLY PRINTED ON THE FACE OF A BILL OF LADING.

The Eleventh Circuit found that "the MAR [SHIPPING LINE, INC.] bill of lading is illegible." The Court held that a shipper of goods, and presumably its insurer, consignee, bankers, and all others who rely upon the terms and conditions of bills of lading can be contractually bound by the terms of an illegible bill of lading. The decision is based upon the testimony of a freight forwarder, a type of travel agent who books shipments of cargo for numerous shippers with numerous carriers, who stated "that in preparing hundreds of bills of lading for EDUSYSTEMS he had never read the provisions on

the reverse side." However, there was no evidence of the fact that the freight forwarder had ever seen a legible copy of MAR'S bill of lading, or that the freight forwarder was an agent for the shipper, as opposed to being an agent for the carrier. The Court did note that some of MARS' bills of lading were printed clearly but it based that finding upon the fact that MAR SHIPPING LINE was able to attach a clear blank bill of lading to a Memorandum of Law in Opposition to the Plaintiff's Motion for Partial Summary Judgment, not upon a finding that MAR had ever used legible bills of lading in commerce. In short, there was no evidence that anyone other than MAR knew what its bill of lading said because no one testified that they had ever seen a legible bill of lading used by MAR.

The Eleventh Circuit's decision on this issue is commercially unreasonable. The

Fourth and Ninth Circuit Courts of Appeal have held that in order to prove "fair opportunity", notification of the $500.00 per package limitation contained in 46 U.S.C. Section 1304(5) must appear on the front of the bill of lading. This rule, which takes note of commercial realities was first enunciated by the Ninth Circuit in the case of Pan American World Airways, Inc. vs. California Stevedore & Ballast Company, 559 F.2d 1173 (9th Cir. 1977). In its analysis, the Ninth Circuit stated:

> We reject the appellant's argument that an experienced shipper should be deemed to have knowledge of an opportunity to secure an alternative freight rate, and higher carrier liability by reason of his knowledge of COGSA, 46 U.S.C. Section 1304(5), made applicable by a "paramount clause" in the bill of lading, where such opportunity does not present itself on the face of the bill of lading. The bill of lading is usually a boiler plate form drafted by the carrier, and presented for acceptance as a matter of routine business practice to a relatively

> low level shipping employee. We feel that imputing such knowledge of COGSA applicability and provisions to such an employee is an assumption that may go beyond the bounds of commercial realism.

Since the decision of the Ninth Circuit in Pan American, ocean carriers have stated that it places upon them too great a burden. This argument was rejected again by the Ninth Circuit in Komatsu, Ltd. vs. States Steamship Company, 674 F.2d. 806 (9th Cir. 1982). There the Court stated:

> [The Defendant] also complains that, unless incorporation by reference of COGSA is recognized as prima facia evidence, carriers will be forced to expressly reprint the language of Section 4(5) in full. [The Defendant] contends that this will complicate and lengthen shipping forms. This may be true, but we are not empowered to disregard our Circuit's precedent for the sake of the carrier's administrative convenience.

When the Fourth Circuit was asked to consider the same issue and balance the approaches taken by the Fifth and the Eleventh

Circuits with the position taken by the Ninth Circuit, the Fourth Circuit agreed that the limitation of liability language must be printed conspicuously and must be contained on the face of the bill of lading rather than in small print on its back. As the Fourth Circuit stated in Cincinnati Milacron, Ltd. vs. M/V American Legend, 784 F.2d. 1161 (4th Cir. 1986):

> The Courts have attempted to effect Congressional intent by interpreting Section 1304(5) to require carriers to afford shippers a fair opportunity to avoid the limitation of liability of that statute. To allow constructive notice is to emasculate the fair opportunity requirement. Like the Ninth Circuit, we are unwilling to impute the knowledge of limited liability under Section 1304(5) to a shipper's employee from a bill of lading which merely refers him to yet another lengthy document where the limitation is then revealed... language which explicitly brings the limitation of Section 1304(5) to the attention of the shipper must appear on the face of the bill of lading issued to the shipper. For similar reasons, we hold the tariff on file

with the Federal Maritime Commission is not prima facie evidence of fair opportunity.

The decisions of the Ninth and Fourth Circuits with regard to adequate opportunity to declare value have been followed by a number of District Courts and Circuits which have not formed rulings on this particular issue. In Royal Embassey vs. Ioannis Martinos, 1986 AMC 791 (E.D.N.C. 1984) the District Court found that an "express recitation" of COGSA Section 4(5) providing for a limitation of liability was necessary for the carrier to make a prima facie showing that the shipper had an opportunity to avoid the limitation. Since the bill of lading did not contain such an express recitation, the $500.00 per package limitation was found not to apply. A similar result was reached by the Northern District of Illinois in D.B. Trade International, Inc. vs. Astramar, 592 F.Supp.

1215 (N.D. Ill. 1984) where the Court stated:

> The Ninth Circuit's reasoning is more persuasive. Neither of the Fifth Circuit's decisions adequately addressed the key issue in determining whether or not the shipper had a "fair opportunity" to declare the actual value of its shipment...unless the bill of lading expressly states that the $500.00 limitation of liability applies, the shipper is aware only of the fact that COGSA applies, not that some limitation of liability lurks somewhere in the statute..."

In order to effect the overriding policy of uniformity in international commerce, it is important that this Court resolve the conflict between the Circuits. If the shipper in this case had chosen to ship its goods from a port on the West Coast of the United States or within the Fourth Circuit, its liability would not have been limited. Because it chose to ship its goods from Miami, its liability has been limited.

CONCLUSION

The decision of the Eleventh Circuit in this case may do little violence to the financial stability of these individual parties who are represented by large insurers not prone to receiving judicial sympathy. However, the decision creates an exception to what was a well-settled and remarkably non-litigious point of transportation law. When this Court decided in 1953 that Mrs. Nothnagle was entitled to recover from a railroad the full value of her lost luggage because the railroad did not give her a lower freight rate for its limited liability, it settled the issue for 35 years. The Court made no inquiry into whether or not Mrs. Nothnagle would have paid a higher rate because such subjective determinations are unnecessary. If the rate had been contained in the tariff, she would have been presumed to have notice; if it had

not been, she would not be so bound. EDUSYSTEMS is in substantially the same position as Mrs. Nothnagle. Edusystems received a bill of lading whose terms were illegible, Mrs. Nothnagle received no receipt for her luggage, Edusystems made no election to ship at a lower freight rate, nor did Mrs. Nothnagle. The result alone is inconsistent.

The uniformity of maritime law is again challenged by the notice required in each Circuit. Airline tickets, bus tickets, rail passes, and other transportation contracts all contain limitations on liability. Most limitations are printed in large type. Now the regions of the country are divided along the lines of type size and placement of the notice. The Eleventh Circuit is on the side of virtually no written notice while the Ninth and Fourth Circuits are for conspicuous notice. The non-uniformity of the law is

severe enough to warrant Supreme Court review to settle the issue, hopefully on the side of conspicuous notice.

Respectfully submitted,
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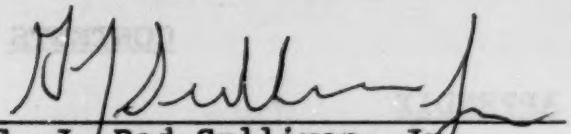
LAW OFFICES OF SULLIVAN & VLCEK



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APPENDIX

A-2 Opinion, dated May 18, 1990

B-2 Notice denying Petition for Rehearing, dated June 20, 1990

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

INSURANCE COMPANY OF NORTH AMERICA,

Plaintiff-Appellee-Cross Appellant,

v.

M/V OCEAN LYNX, a/k/a M/V OCEAN LINK, her engines, tackle, furnishings, etc., in rem, et al., Defendants,

Mar Shipping Line, Inc., a foreign corporation, Defendant-Appellee, Cross-Appellee,

A. Bottacchi S.A. De Navegacion, a foreign corporation, Defendant-Appellant, Cross-Appellee.

No. 89-5301

May 18, 1990.

Appeals from the United States District Court for the Souther District of Florida

Before JOHNSON, Circuit Judge, HILL* and HENLEY **, Senior Circuit Judges

JOHNSON, Circuit Judge:

This case arises on appeal from the district court's judgment limiting the

defendants' liability under the Carriage of Goods by Sea Act, 46 U.S.C.A. App. Sections 1300-15 ("COGSA"), and from the district court's order granting the defendant Mar Shipping Line, Inc. ("Mar") attorneys' fees and prejudgment interest on its cross-claim against the defendant A. Bottacchi, S.A. De Navegacion ("Bottacchi").

** Honorable J. Smith Henley, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

I. FACTS

A. *Background*

Educational Innovation Systems International, Inc. ("Edusystems") shipped 59 boxes of vocational and agricultural equipment to Asuncion, Paraguay on May 9, 1985. Through a freight forwarder in Miami, Meadows Wye and Company ("Meadows"), Edusystems entered into a

contract with Mar, which is a non-vessel-operating common carrier,[1] for transportation of the cargo from Miami to Paraguay. Mar, acting as Edusystems' agent,[2] entered into a carriage contract with Bottacchi for shipment of the cargo from Miami to Buenos Aires, Argentina.[3] Bottacchi loaded the cargo onto the M/V Ocean Lynx, a vessel chartered by

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[1] A non-vessel-operating common carrier is defined by which the ocean transportation is provided, and is a shipper in its relationship with an ocean common carrier." 46 C.F.R. Section 510.2(1)

[2] Edusystems may treat Mar as a common carrier for purposes of COGSA, but underlying carriers such a Bottacchi treat Mar as Edusystems' agent. *See Insurance Co. of N. Am. v. S/S Argosy*, 732 F.2d 299, 301 (2d Cir. 9184); 46 C.F.R. Section 510.2(k)

[3] Buenos Aires was the transshipment port from which the cargo would be sent to Paraguay.

Bottacchi and owned by Nabadi Maritime, S.A. On June 7, 1985, the Ocean Lynx encountered rough weather, and the container holding the cargo was lost at sea.

Both Mar and Bottacchi supplied bills of lading. The Mar bill of lading consists of one piece of paper. The front identifies the parties and contains a block where the shipping cost is calculated. The back contains twenty-seven clauses in extremely find print.[4] Clause one states that the carriage contract is subject to COGSA, and clause sixteen recites provisions of COGSA section 4(5), 46 U.S.C.A. App. Section 1304(5), limiting Mar's liability for loss to $500 per package. Clause sixteen states,

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[4] the Mar bill of lading is illegible. The district court stated that "the size of the letters give[s] new meaning to the words 'fine print.'" We can only agree.

> In case of any loss or damage to or in connection with the goods exceeding $500.00...the value of the goods shall be deemed to be $500.00 per package...unless the nature of the goods and a valuation higher than $500.00 shall have been declared in writing by the shipper upon delivery to the carrier and inserted in this bill of lading and extra freight paid if required...[in which case] the carrier's liability, if any, shall not exceed the declared value....

The Bottacchi bill of lading states that it binds the owner of the cargo and that it supersedes all other agreements covering the shipment. The back of the bill of lading is also in fine print and contains provisions identical to the Mar bill of lading.[5]

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[5] The fine print on the Bottacchi bill of lading is clearer than that on the Mar bill of lading and can be read with the naked eye.

Mar had filed a tariff with the Federal Maritime Commission. The tariff included a copy of Mar's bill of lading. Rule Twelve of the tariff provided for a declaration of increased valuation that would increase Mar's liability beyond $500 per package. In case of a declaration of excess value, Mar's tariff provided for additional freight charges. Bottacchi also had filed a tariff with the Federal Maritime Commission. Rule Twelve, "Ad Valorem Rates," states that "[a]n ad valorem or 2% value to be declared on bill of lading, shall be assessed on the following: Currency, Specie, Gold or Silver Bullion, Precious Metals N.O.S., and Negotiable Securities. Minimum bill of lading charge--$101.50."

Edusystems' freight forwarder, Meadows, and Mar's freight forwarder, Continental, had dealt with one another on numerous occasions.

Meadows has acted as freight forwarder for Edusystems hundreds of times. One none of these occasions did Edusystems' representative declare the value of a shipment and pay added freight charges.

B. *Proceedings in the District Court*

On March 28, 1986, Edusystems' insurer, Insurance Company of North America (the "plaintiff"),[6] filed a complaint against the M/V Ocean Lynx, in *rem*, Mar, Bottacchi, and Nobadi Maritime, S.As., claiming $244,-820 damages for the lost cargo.[7] Mar and Bottacchi answered asserting that their

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[6] The plaintiff had issued marine insurance covering the shipment of this cargo. The plaintiff paid Edusystems a total of $201,972 on the loss of the cargo.

[7] The Ocean Lynx and Nabadi Maritime were never served and are not involved in this appeal.

liability was limited to $500 per package under COGSA. Mar also filed a cross-claim against Bottacchi for Mar's damages, interest and costs in the action.

On January 9, 1987, Mar served the plaintiff with an offer of judgment of $29,-500 plus interest and costs.[8] On the same day, Bottacchi served Mar with an offer of judgment of $34,500.[9] The plaintiff and Mar rejected these offers.[10]

The district court held a bench trial on

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[8] This offer provided $500 per package of cargo lost.

[9] Bottacchi asserts that $34,500 reflected $500 per package in damages plus pre-judgment interest and costs up to January 8, 1987.

[10] Bottacchi's offer of judgment inexplicably is not included in the record on appeal.

September 8-9, 1987. The court found that under COGSA section 4(5) Mar's and Bottacchi's liability was limited to $500 per package lost. The court rejected the plaintiff's argument that Mar's bill of lading was illegible and therefore did not invoke COGSA section 4(5)'s limitation on liability. The court found that the print on the back of the Mar bill of lading appeared blurry, but stated that "[w]ith the aid of a magnifying glass...most of the words and numerals can be read by a party examining the words and conditions stated therein." Nevertheless, the court found that the Mar bill of lading was sufficient in incorporate COGSA section 4(5)'s limitation of liability.

The court also rejected the plaintiff's argument that COGSA section 4(5) did not apply because Mar and Bottacchi did not present Edusystems with an opportunity to declare the

cargo's value. The court stated that incorporation of COGSA in the bills of lading provided a fair opportunity to declare excess value as a matter of law. The court also found that Mar's tariff was valid and presented the plaintiff with an opportunity to declare the cargo's value. Accordingly, the district court entered judgment for the plaintiff against Mar for $29,500 on the plaintiff's complaint and judgment for Mar against Bottacchi for $29,500 on Mar's cross-claim.

On January 8, 1988, Mar moved to recover attorneys fees and costs from Bottacchi from defending against the plaintiff's claim and to recover costs from the plaintiff. Mar claimed that it was entitled to attorneys' fees from Bottacchi for defending the main claim because it was an indemnitee of Bottacchi. Mar claimed that it was entitled to costs accrued

after January 22, 1987 from the plaintiff because the plaintiff refused Mar's offer of judgment.[11] On January 15, 1988, Bottacchi moved the court to deny Mar pre-judgment interest and to tax costs against Mar because Mar rejected Bottacchi's offer of judgment.

In an order dated February 22, 1989, the district court granted Mar's motion against Bottacchi, awarding Mar $22,262 in attorneys' fees. The court also awarded Mar $563 in costs against the plaintiff. Finally, the court denied Bottacchi's motion to limit Mar's pre-judgment interest and awarded Mar the same amount of pre-judgment interest from Bottacchi as the court had awarded the plaintiff from Mar.

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[11] By asserting entitlement to costs after January 22, 1987, Mar allowed the plaintiff 10 days plus three days for mailing to Mar's offer of judgment.

In this appeal, we first consider whether the district court erred in holding that Mar and Bottacchi have limited liability under COGSA section 4(5). Second, we consider whether the district court erred in holding that Mar could recover attorneys' fees from Bottacchi from the cost of defending against the Plaintiff's claim. Finally, we consider whether the district court erred in ruling that Mar could recover pre-judgment interest from Bottacchi for a period after Bottacchi's offer of judgment.

II. STANDARD OF REVIEW

The district court's interpretation of a statute is subject to *de novo* review by this Court. *Keys Jet Ski, Inc. v. Kays*, 893 F.2d 1225, 1227 (11th Cir. 1990). The district court's findings of fact are subject to "clearly erroneous" review in this Court. *Anderson v. Bessemer City*, 470 U.S. 564, 573,

105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985).

III. ANALYSIS

A. *Limited Liability*

COGSA section 4(5) provides as follows:

> Neither the carrier nor the ship shall in any event become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package...unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.

46 U.S.C.A. App. Section 1304(5). Congress enacted the COGSA limitation on liability in 1936 in order to restrain the superior bargaining power wielded by carriers over shippers by setting a reasonable limitation on liability that the carrier could not reduce by contract. *Sony Magnetic Prods., Inc. vs. Merivienti O/Y*, 863 F.2d 1537, 1542

(11th Cir. 1989).

Courts have develop two preconditions to involving COGSA section 4(5)'s limitation on liability. First, the carrier must give the shipper adequate notice of the $500 limitation by including a "clause paramount" in the bill of lading that expressly adopts the provisions of COGSA. *Brown & Root, Inc. vs. M/V Peisander*, 648 F.2d 415, 420 (5th Cir. 1981); *General Elec. Co. v. MV Nedlloyd*, 817 F.2d 1022, 1029 (2d Cir. 1987); 46 U.S.C.A. App. Section 1312. Second, the carrier must give the shipper a fair opportunity to avoid COGSA section 4(5)'s limitation by declaring excess value. *Brown & Root*, 648 F.2d at 420 & N.11; *General Elec.*, 817 F.2d at 1028.

The clause paramount establishes three things. First, it makes COGSA applicable at times when it would not apply of its own force. *Brown & Root*, 648 F.2d at 420.

Second, COGSA's provisions are deemed incorporated into the bill of lading. *Id.* Third, nothing in the bill of lading can increase the carrier's liability under COGSA, which overrules any clause in the bill of lading that conflicts with COGSA. *Id.*

The *Brown & Root* court discussed what is necessary for a carrier to meet the second precondition to involving COGSA section 4(5)'s limitation on liability: that the carrier afford an opportunity for the shipper to declare excess value. In *Brown & Root*, the carrier had included a clause paramount in its bill of lading. The bill of lading, however, also included a clause stating that "in no case" would the liability of the carrier exceed $500. Moreover, the bill of lading contained no blank space where the shipper could write in excess valuation. Nevertheless, the court found that the shipper

had an opportunity to declare excess valuation for two reasons:

> First, COGSA was expressly incorporated in the bill of lading to thereby bring into play Section 4(5). Next, and far more significantly, the published tariff which has the effect of law very carefully gave [the s]hipper a choice of valuations by a choice of precisely definable freight rates.

Id. at 424 (citations omitted). *Brown & Root* thus adopted a system of constructive notice of an opportunity to declare excess valuation. *Id.* Either a clause paramount in the bill of lading or a valid tariff filed with the Federal Maritime Commission that includes an opportunity to declare excess value according to COGSA section 4(5)'s provisions is sufficient to afford the shipper an opportunity to declare excess value. *Brown &*

Root, 648 F.2d at 424.

In the present case, the plaintiff first argues that the Mar bill of lading was illegible and therefore did not provide shippers with notice of COGSA section 4(5)'s limitation on liability. The plaintiff also argues that Bottacchi's tariff failed to provide shippers with an opportunity to declare excess value.

1. Mar's Bill of Lading

The district court found that the back of Mar's bill of lading, which contained a clause paramount and a clause reciting COGSA section 4(5), could not be read without the aid of a magnifying glass.[12] In *Nemeth v. General S.S. Corp.*, 694 F.2d 609, 611-12 (9th

[12] The mar bill of lading in the present case was doubly unreadable because it had been photocopies many times, leaving the fine print on the reverse side completely indecipherable.

Cir.1982), the Ninth Circuit held that "microscopic" print on a bill of lading was insufficient to give the shipper a fair opportunity to avoid COGSA section 4(5). This holding is persuasive; print that cannot be read with the naked eye can hardly impart notice. In the present case, however, Meadows, Edusystems' agent, maintained multiple copies of the Mar master bill of lading in its files,[13] and yet Meadows' representative, Albert Fabrikant, testified that in preparing hundreds of bills of lading for Edusystems he had never read the provisions on the reverse side. Meadows certainly had an opportunity to read these

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[13] Meadows actually prepared the Mar bill of lading in the present case.

copies of Mar's bill of lading.[14] Accordingly, the plaintiff's argument that Edusystems was not afforded an opportunity to avoid COGSA section 4(5)'s limitation of liability lacks merit. *See Cincinnati Milacron, Ltd. vs. M/V American Legend*, 784 F.2d 1161, 1166 (4th Cir.) (Phillips, J., dissenting), *rev'd*, 804 F.2d 837 (4th Cir. 1986) (*en banc* court reversed panel opinion on the basis of dissent of Phillips, J.); *Carman Tool & Abrasives, Inc. v. Evergreen Lines*, 871 F.2d 897, 900 n. 6 (9th Cir. 1989); *Aetna Ins. Co. v. M/V Lash Italia*, 858 F.2d 190, 194 (4th Cir. 1988); *see also First Pennsylvania Bank v. Eastern Airlines, Inc.* 731 F.2d 1113, 1122 (3rd Cir. 1984).

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[14] Some of Mar's bills of lading were printed clearly. *See* Mar shipping Lines' Memorandum of Law in Opposition to Plaintiff's Motion for Partial Summary Judgment, Exhibit A.

The plaintiff also fails to address the district court's holding that Edusystems did not desire to avoid COGSA section 4(5)'s limitation on liability by opting for a higher freight charge. The court found that Edusystems had chosen to rely on its policy with the plaintiff to cover any losses. In *General Elec.*, the Second Circuit ruled that where the shipper was experienced and the record showed that the shipper had never taken any steps toward actually declaring excess value, the court would not allow the shipper to challenge the adequacy of its opportunity to declare excess value. *General Elec.*, 817 F.2d at 1029. Similarly, in the present case, Edusystems had made hundreds of shipments with Mar without ever inquiring into declaring excess value. Under these circumstances it is reasonable to conclude that Edusystems did not wish to insure against losses twice and chose

to rely on its policy with the plaintiff.

2. Bottacchi's Tariff

[8] Rule 12 of Bottacchi's tariff provides that an *ad valorem* rate shall be applied to shipments of certain commodities. It does not provide for the method through which a shipper of goods other than the listed commodities can avoid COGSA section 4(5)'s limitation on liability. Bottacchi's bill of lading, however, does contain a clause paramount invoking the provisions of COGSA, and clause sixteen of Bottacchi's bill of lading recites the provisions of COGSA section 4(5). In *Brown & Root*, the court found that such a clause was sufficient to give the shipper constructive notice of a fair opportunity to declare excess value. "COGSA was expressly incorporated into the bill of lading to thereby bring into play Section 4(5)." *Id.* at 424. Once COGSA was

incorporated, the court held, the provisions of COGSA section 4(5) spelled out how a shipper could declare excess value, and the burden was on the shipper to declare excess value. *Id.* at 425.

> COGSA Section 4(5) does not prescribe that the face of the bill of lading contain a specific space or blank in which the increased valuation is to be inserted nor does it provide that the carrier rather than the shipper must actually make the notation. The phrase "unless the nature and value of such goods have been declared by the shipper before shipment and inserted into the bill of lading" [, COGSA Section 4(5),] clearly puts the burden on the shipper to make the determination as between value limitations and the making of the declarations.

Id. at 424. Accordingly, the plaintiff's argument based on Bottacchi's tariff lacks merit.

B. *Attorneys' Fees*

1. Indemnity Action

Bottacchi argues that the district court erred in awarding attorneys' fees to Mar for defending against the plaintiff's claim. Bottacchi argues that Mar's claim is governed by COGSA, which does not provide for attorneys' fees, and therefore under the American Rule Mar cannot recover attorneys' fees. Mar argues that it was Bottacchi's indemnitee and therefore can recover attorneys' fees expended in defending against the plaintiff's claim.[15]

Congress has not explicitly provided for

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[15] Mar acknowledges that it cannot recover attorneys' fees expended in its indemnification action against Bottacchi.

the award of attorneys' fees in COGSA actions. *Noritake Co. v. M/V Hallenic Champion*, 627 F.2d 724, 730 (5th Circ. Unite A 1980). In admiralty cases, moreover, the general rule is that attorneys' fees are not awarded. *Platoro Ltd. v. Unidentified Remains of a Vessel*, 694 F.2d 893, 905 (5th Cir. 1983). In the case of an indemnitee, however, the indemnitee can recover attorneys' fees from his indemnitor as part of the reasonable expenses of defending a claim. *See Cotten v. Two "R" Drilling Co.*, 508 F.2d 669, 671 (5th Cir. 1975); *Noritake*, 627 F.2d at 724 n. 5; *see also Maseda v. Honda Motor Co.*, 861 F.2d 1248, 1256 (11th Cir. 1988)(Florida law); *Nitram, Inc. v. Cretan Life*, 599 F.2d 1359, 1372 (5th Cir. 1979).

Bottacchi claims that the present case was not an indemnity action, pointing to the form of the district court's judgment, which

did not use the term "indemnity." Bottacchi also argues that COGSA provided Mar's exclusive remedy in this case, and that therefore Mar's case could not have been one for indemnification. Mar argues that the pre-trial order in this case stipulated that indemnification was an issue, and that the district court's February 22, 1989 order found that Mar was an indemnitee.

Mar's cross-claim against Bottacchi stated a prima facie case under COGSA. The joint pre-trial stipulation of Mar and Bottacchi, however, stated that Mar "would claim reasonable attorney's fees against A. Bottacchi, S.A. pursuant to [Mar's] cross claim for indemnity."[16] The pre-trial order

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[16] The parties failed to include the pre-trial order in the record on appeal. Accordingly, we rely on the pre-trial stipulation between Bottacchi and Mar.

controls the future course of the action, and Mar was not required to amend the pleadings to reflect the indemnified issue. *Feazell v. Tropicana Prods., Inc.*, 819 F.2d 1036, 1040 (11th Cir. 1987) (pre-trial stipulation); Fed.R.Civ.P. 16(e); 3 J. Moore, *Moore's Federal Practice* Section 16.12 (2d ed. 1989).

The real parties in interest in this case were the plaintiff and Bottacchi, and any claims recoverable by the plaintiff against Mar also would have been recoverable by Mar against Bottacchi. Mar's expenditures defending the main claim, moreover, benefitted Bottacchi by limiting Bottacchi's liability. Under these circumstances, we hold that Mar was an indemnitee of Bottacchi and can recover attorneys fees. *Cf. Strachan Shipping Co. vs. Koninklyke Nederlandsche Stoomboot Maalschappy, N.V*, 324 F.2d 746 (5th Circ. 1963) (where jury found that carrier acted

properly and stevedore acted negligently causing injury, carrier could recover from the stevedore attorneys' fees expended defending the main action despite the absence of an express contract of indemnification).

2. Attorneys Fees and COGSA Section 4(5)

[13] Bottacchi also argues that Mar's attorneys' fees are part of Mar's overall damages in this case and therefore limited by COGSA section 4(5). Mar argues that attorneys' fees are excluded from the calculation of general damages under COGSA, and that therefore attorneys' fees do not fall under the $500 per package limitation that is applied to damages under COGSA. The district court found that the language in clause sixteen of Bottacchi's bill of lading, which recited provisions of COGSA section 4(5), was distinguishable from "red letter" clauses limiting liability for "any claim." The court

found that

> [c]lause sixteen attempts to do no more than protect a carrier against exposure to substantial liability for the loss of highly valuable cargo when the shipper has not declared the higher value and paid an additional freight charge on it. For this reason, clause sixteen does *not* operate as a red-letter clause.

The district court' interpretation of COGSA section 4(5) is correct. The statute does not purport to include all types of claims in the $500-per-package limitation. *Cf. Noritake*, 627 F.2d at 729 (awarding pre-judgment interest in a COGSA action). Accordingly, Mar's attorneys' fee claims are not limited by COGSA section 4(5).

C. *Mar's Pre-Judgment Interest*

As a general rule, pre-judgment interest should be awarded in admiralty cases. Pre-

judgment interest is nota penalty, but compensation to the plaintiff for the use of funds that were rightfully his. *Self v. Great Lakes Dredge & Dock Co.*, 832 F.2d 1540, 1550 (11th Cir. 1987) (citing *Noritake*, 627 F.2d at 728). The court has discretion to deny pre-judgment interest only when "peculiar circumstances" make it inequitable for the losing party to pay pre-judgment interest. *Id.; Parker Towing Co. vs. Yazoo River Towing, Inc.*, 794 F.2d 591, 594 (11th Cir. 1986)(peculiar circumstances include cases involving a genuine dispute about liability and cases of apportioned fault). We review the district court's decision on whether to award prejudgment interest for abuse of discretion. *Parker Towing*, 794 F.2d at 594.

In the present case, the district court found that no peculiar circumstances existed to justify denying pre-judgment interest.

Bottacchi argues that its offer of judgment was a peculiar circumstances and that therefore the district court abused its discretion in denying pre-judgment interest in this case. Bottacchi's argument does not take into account Mar's simultaneous offer of judgment to the plaintiff, which the plaintiff rejected. I would have been foolish for Mar to accept Bottacchi's offer of judgment after the plaintiff rejected Mar's offer.[17] Accordingly, the district court did not abuse its discretion in holding that peculiar circumstances did not exist in this case precluding an award of pre-judgment interest.

IV. CONCLUSION

We AFFIRM the district court's holding

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[17] The district court' December 29, 1987 judgment taxed exactly the same amount of prejudgment interest against Mar in favor of the plaintiff as it taxed against Bottacchi in favor of Mar.

that Mar and Bottacchi have limited liability under COGSA and the district court's awards of attorneys' fees and pre-judgment interest.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

89-5301

INSURANCE COMPANY OF NORTH AMERICA,

Plaintiff-Appellee
-Cross Appellant,

versus

M/V OCEAN LYNX, a/k/a M/V OCEAN LINK, her engines, tackle, furnishings, etc. IN REM, ET AL,

Defendants,

Mar Shipping Line, Inc., a foreign corporation,

Defendant-Appellee, Cross-Appellee,

A. Bottacchi S.A. De Navegacion, a foreign corporation,

Defendant-Appellant-Cross-Appellee.

Appeal from the United States District Court for the Souther District of Florida

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ON PETITION(S) FOR REHEARING
(June 20, L990)

BEFORE: JOHNSON, Circuit Judge, HILL*, and HENLEY**, Senior Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by Appellant-Cross-Appellee A BOTTACCHI S.A. DE NAVEGACION is *denied*.

ENTERED FOR THE COURT:

_____
United States Circuit Judge

*See Rule 34-2 (b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

**Honorable J. Smith Henley, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by designation.